THE LAW SOCIETY OF HONG KONG 香港律師會

Public Consultation Document

"P*romoting Competition – Maintaining our Economic Drive*"

Law Society's Replies to the Twenty Key Questions

Introduction

The Law Society established a Working Party, inter alia, to consider the Competition Policy Review Committee's June 2006 *Report on the Review of Hong Kong's Competition Policy* and the Economic Development and Labour Bureau's November 2006 public discussion document entitled *Promoting Competition – Maintaining our Economic Drive*.

There are divergent views about the wisdom of introducing a competition law to regulate business activity. Certainly, a competition law on its own will not create a competitive environment. Many argue that since Hong Kong is a free and open economy with few entry barriers, companies are already free to compete. Smaller companies fear that the inherent bureaucracy and cost of compliance with a competition law will increase the cost of doing business. On the other hand, the small size of the market means that some sectors are dominated by a few big companies, which may not in fact be acting anti-competitively. Economies of scale and efficiencies inherent in certain so-called natural monopolies, as well as the legitimate exercise of intellectual property rights, could well be in the public interest.

Although the view of the Working Party is that Hong Kong should have a competition law, it needs to be properly designed so as to recognize the above concerns (concerns which are indeed felt by individual members of the Law Society and by clients). Supporting the idea in principle does not mean that the law should be unfettered or exercised in a heavy handed way. It should not interfere with existing practices unless shown to be anti-competitive and not in the public interest. It should not be designed to force, but to reinforce and encourage Hong Kong's existing competitiveness. To this extent a competition law should be cross sector target, possible anti-competitive behaviour in the market (such as price fixing, bid rigging, market allocation, sales and production quotas, joint boycotts, unfair or discriminating standards) and abuse of dominance rather than the existence of certain markets or dominance as such.

Currently there is a lack of hard evidence of anti-competitive activity in Hong Kong though it is suspected in certain areas of business. A particular advantage of introducing a competition law is that it will enable the detection of anti-competitive activity and the collection of evidence of anti-competitive behaviour, whilst a leniency policy will encourage whistleblowers to uncover cartels. More positively, the beneficial results of introducing a competition law have been demonstrated in

the telecommunications market resulting in enhanced consumer choice, increased innovation and reduced prices.

Question 1
Does Hong Kong (HK) need a new competition law?

1.1 Hong Kong does need a new competition law.

1.2 At present, Hong Kong law does not provide a meaningful or, for most sectors of the economy other than the telecommunications sector, any regulatory framework for ensuring that Hong Kong's economy regulates anti-competitive behaviour. In an increasingly globalized world economy having a suitable regulatory framework for addressing abuses inflicted as a result of market participants having a degree of dominance in their respective industries is generally regarded as being an important element of economic performance. Hong Kong's relatively small size makes the need for an effective competitive law important if Hong Kong is to continue to flourish in an increasingly globalized economy.

1.3 The World Bank and the Organisation for Economic Cooperation and Development (OECD) have described the nature of competition in a market-based economy as: *"forcing firms to become efficient and to offer a greater choice of products and services at lower prices"*[1]. The statement highlights the twofold effect of competition to both businesses and consumers, resulting in an overall benefit on the economy and its participants as a whole.

1.4 The British Chamber of Commerce believes that "*fair competition is one of the keys to a good environment for investment as it gives impetus for continuous improvements in products and services*".[2]

1.5 There has been a significant transformation of economic activities in Hong Kong in the past two decades, from manufacturing to a service industry. According to the Hong Kong Institute of Economics and Business Strategy (HIEBS)[3], nominal GDP contributed by total services increased from HK$90.7 billion in 1980 to HK$1050.4 billion in 1997 and the percentage share of nominal GDP contributed by services increased from 67.5 percent to 85.2 percent, while the corresponding figure for manufacturing decreased from 23.7 percent to an estimated 6.5 percent in the same period. The Hong Kong Trade Development Council's Economic Forum believes that "*a lack of competition would strangle Hong Kong. Without competition, there will be less pressure to improve.*"[4]

1.6 Without relevant competition legislation in Hong Kong, there will be no procedure by which businesses engaging in anti-competitive conduct can be directed. This would have the effect of impairing the economic efficiency of the economy.

1.7 HK has a small market economy and it should be noted that whether and how firms compete will be a matter of the natural conditions of the market. According to Michal Gal[5], a "*key*

[1] "A Framework for the Design and Implementation of Competition Law and Policy": World bank and OECD, November 1998 (pg 2 Promoting Competition discussion document)

[2] The British Chamber of Commerce's Thinking on the Need for a Competition Law for Hong Kong – Jo Wilson 31/08/2006

[3] HIEBS working paper, 'HK: From an Industrialized City to a Center of Manufacturing-Related Services' – Zhigang Tao & YC Richard Wong, based on "An Economic Study of HK's Producer Service Sector and its Role in Supporting Manufacturing" (http://www.hiebs.hku.hk/working_paper_updates/pdf/wp1022.pdf)

[4] http://www.tdctrade.com/econforum/sc/sc060801.htm

feature of small economies is the concentrated nature of many of the markets. Any new competition policy should therefore be designed to deal effectively with these unique obstacles to competition."

1.8 Another persuading factor towards the introduction of a new competition law in Hong Kong is the trend towards global harmonisation of competition policies.

1.9 The two sectors of Hong Kong's economy which have existing competition regulations are telecoms and broadcasting. It is widely accepted in the market place that both sectors have benefited from the existence of such competition laws.

1.10 The Law Society agrees with the arguments set out in paragraphs 45 and 47 of the Discussion Document.

Question 2
Should any new competition law extend to all sectors of the economy, or should it only target a limited number of sectors, leaving the remaining sectors purely to administrative oversight?

2.1 The new competition law should extend to all sectors of the economy.

2.2 In addition, it would be inefficient and very difficult to legislate on a sector by sector basis. Current reports by COMPAG are often submitted without all data as currently there is only a requirement of businesses to 'co-operate'. This will lead to difficulties about defining specific sectors and limitations when deciding what sort of anti-competitive provisions should apply to which sectors.

2.3 Difficulties of defining individual sectors

As technology advances and businesses develop there is often overlap between business sectors. It would be very difficult to determine, for example, what comprises the "'*retail*" sector. For practical purposes, it would be problematic to break down sectors to try and establish which particular regulation is to apply to each. Attempting to do so could well have the effect of frustrating the implementation and application of the new competition law.

There is also often vertical and horizontal overlap between business sectors (e.g. bundled services) which may prove difficult to properly regulate through sector specific regulation.

2.4 Remaining sectors should not be left purely to administrative oversight

The argument for legislating for competition only in the sectors where competition is felt to be an issue of concern raises, among other problems, the issue of dealing with other sectors if and when a competition problem were to arise. With a universal "*cross-sector*" approach the cost, time and delay of implementing new legislation each time a competition issue arose would be avoided.

If a business that is regulated in a particular sector deals with one that is not subject to regulation this could also be a problem.

[5] Competition policy for small market economies – Michal S. Gal (ISBN: 0-674-01049-3 / 0674010493)

2.5 Different regulators for different sectors

If there are regulators for each sector this could be an inefficiency of resources. The Law Society is of the view that it would be more efficient and practical to have a single regulator addressing all sectors of the economy.

2.6 Additional issue

The existing telecoms legislation is very oddly drafted and, if there is going to be general competition legislation, the Law Society would advocate the application of the same legislation to all sectors. This does not preclude there being additional sector specific regulations of a non-competition nature.

Question 3
Should the scope of any new competition law cover only specific types of anti-competitive conduct, or should it also include the regulation of market structures, including monopolies and mergers and acquisitions?

3.1 The new competition law should certainly cover conduct related issues. See the response to Question 4 below for further details.

3.2 The question of whether the new competition law should also infringe on market structure issues such as merger control is more debatable. This is in part due to the nature of the political and economic environment in Hong Kong which has always favoured less government intervention in the management of the economy compared to other developed economies.

3.3 One of the perceived problems with introducing a competition law with merger control is that it will not address the large number of sectors which are already dominated by a monopolistic supplier or small group of oligopolistic suppliers. Unless (and it is not suggested here) it is intended to break up these existing monopolies/oligopolies it would be inequitable and potentially counter productive to restrict mergers generally.

3.4 On balance the Law Society is of the view that the new competition law should not introduce merger control. However, it would be open to include a merger control regime in the legislation but not make it effective unless/until it is required at a later date. There is precedent for this application in other legislation (e.g. the Personal Data (Privacy) Ordinance). For completeness, arguments in favour of a merger control legislation are set out in paragraph 3.5-3.7 below with some additional comments on merger control legislation in 3.8.

3.5 Evidence can be drawn from the telecommunications legislation in Hong Kong. Competition provisions have been in place since June 2000 in the Telecommunications Ordinance (Cap 106, ss.7 I-N, s.35A, ss.32 N-R and s.36C). Subsequently new provisions relating to mergers were inserted by virtue of the Telecommunications (Amendment) Ordinance 2003. The reason for the new provisions was that the government recognized the existing provisions to be inadequate as regards to certain types of anti-competitive behaviour. The Telecommunications Authority (TA) had the power to regulate acquisitions and mergers only through license conditions. The limitation was the TA only had the power to regulate if the transfer of license, or under some licenses, transfer of shares in the licensee, was involved. In a brief of the bill to LEGCO, the government recognized that "*mergers and*

acquisitions nowadays often do not involve such transfer as the activities may take place at the holding company level. The legislative framework for regulation of merger and acquisition activities in the telecommunications market is therefore unclear".

3.6 An argument in support of any new competition law including the regulation of market structures (including monopolies and mergers and acquisitions) is illustrated by the government having to amend the Telecommunications Ordinance specifically to address the issue described above. Inevitably market structure will have a role to play in business competition. Mergers and acquisitions do play a large part in anti-competitive conduct, although maybe not to the same extent in Hong Kong as in some other markets (for example, see Chicago Bridge & Iron Company acquisition of Pitt-Des Moines Inc, ruled anticompetitive by the FTC)[6].

3.7 Another argument in support of extending the scope of any new competition law is that of a preventative nature. Businesses and professional advisers will prefer to seek advice before undergoing a transaction to ensure there will be no fear of regulatory risk at a later stage of the transaction. Advice can then be sought as to the tests and procedures that would be followed in assessing relevant transactions and comfort can be given to an acquirer that there will be no competition objections to any proposed merger. Including regulation of market structures in the scope of any new legislation would provide clarity, therefore decreasing the uncertainty for normal merger and acquisition activities.

3.8 If merger control legislation is introduced, the Law Society is of the view that the legislation should provide the regulation with power to intervene but should not require mandatory notification. In effect, this is the UK model and not the more bureaucratic EU model.

Question 4
Should a new competition law define in detail the specific types of anti-competitive conduct to be covered, or should it simply set out a general prohibition against anti competitive conduct with examples of such conduct?

4.1 The Law Society is of the view that the competition law should contain a general prohibition (broadly defined) against anti-competitive conduct with a non-exhaustive list of types of conduct (including those set out in the Consultation Paper) which will be deemed to be anti-competitive unless the contrary is established on the facts of a particular case. By including a list of anti-competitive conduct (i) market participants are put on stronger notice as to forms of conduct that will be unacceptable; and (ii) there is less scope to frustrate the competition law through technical arguments as to whether a particular form of conduct is anti-competitive. The legislation should make it clear that the list is not exhaustive.

4.2 From a legal perspective, there are many instances of legislation which have purported to be exhaustive in defining what forms of activity are permitted or prohibited or otherwise subject to regulation. Such pieces of legislation have a history of being problematic in that they create an environment where persons affected by the legislation structure their affairs, or take views to the effect that, they fall outside the scope of the legislation (or inside it where that is the preferred outcome). The result is, inevitably, that a considerable amount of effort goes into evaluating on technical construction grounds whether a particular action falls within or outside a particular piece of legislation instead of considering whether the conduct is of a type which ought to be subject to the legislation. In effect, using the

[6] Federal Trade Commission Article (www.ftc.gov/opa/2005/01/cbi.htm)

exhaustive list approach results in an emphasis on legislative technical construction rather than a pragmatic purpose based approach being adopted when the legislation is implemented.

4.3 In addition, legislation affecting the conduct of businesses which is overly rigid in its drafting very often fails to keep pace with developments in the way business is conducted. The predecessor legislation to the current Securities and Futures Ordinance serve as examples of this.

4.4 The model currently adopted under the Securities and Futures Ordinance which gives the regulat**or** the power to issue guidelines has proved to be both useful and practical. The Law Society is of the view that giving a competition regulator the power to issue guidelines would be beneficial.

Question 5
Should a new competition law aim to address only the seven types of conduct identified by the CPRC, or should additional types of conduct also be included, and should the legislation be supported by the issue of guidelines by the regulatory authority?

5.1 If additional types of conduct which would generally be regarded as anti-competitive can be identified, then it would be appropriate to include them in the non-exhaustive list of examples in the new legislation. The legislation should make it clear that the list is not exhaustive.

5.2 The Law Society is of the view that providing the regulator with the power to issue guidance notes (but not having the effect of amending the legislation itself) is both appropriate and practical.

Question 6
In determining whether a particular type of anti-competitive conduct constitutes an infringement of the competition law, should the "*purpose*" or "*effect*" of the conduct in question be taken into account? Or should such conduct on its own be regarded as sufficient in determining that an infringement has taken place?

6.1 Paragraph 78 of the consultation paper asks whether the very fact of engaging in certain types of conduct should automatically constitute an infringement. The Law Society suggests that any particular conduct should only be considered an infringement if it is by its nature anti-competitive and also has the purpose and/or effect of preventing, restricting or distorting competition. Moreover, activities conducted without the purpose of preventing, restricting or distorting competition should be considered less culpable and not subject to criminal or quasi-criminal sanctions.

6.2 The overriding aim of any competition law in Hong Kong should be to enhance economic efficiency and the free flow of trade so as to reinforce business and consumer confidence. Some activities may be regulated (e.g. the professions) in such a way as to stifle the wrong type of competition (such as from unqualified persons) so is not in itself bad. This suggests that even if the conduct in question may be regarded as anti-competitive conduct, as long as the particular conduct does not affect or restrict economic efficiency or the free flow of trade, it should not be contrary to the aims of any new competition law and accordingly there should be no infringement. Thus, whilst certain historically monopolistic areas of business

(e.g. telecoms and broadcasting) may require help to become more competitive, there would be a danger in taking a "*one size fits all*" approach to the introduction of a general competition law. An example is the proposed merger of the KCR and MTR. Whilst clearly reducing competition, it has been argued that such a move would improve efficiency and lower ticket prices. So, in determining the "*effect"* of an activity, consideration should be given not only to objective facts to determine whether a party is acting anti-competitively, but also to economic and other relevant issues to determine whether in fact it is acting in an anti-competitive manner.

6.3 Although more resources may be needed if the test for infringement is to include looking at the purpose and/or effect of a particular conduct as compared to a strict liability test, the latter approach may place an onerous burden on businesses. Competition law is a new concept to Hong Kong and it will be necessary to educate businesses as to what is entailed so as to avoid any inadvertent infringement. It will be harsh on businesses if there are strict prohibitions imposed at the outset.

6.4 Looking at different competition regimes around the world, it seems that the test for infringement is generally based on determining whether the particular conduct has the effect of restricting, distorting or preventing competition in the market. There are no provisions which provide that certain types of anti-competitive conduct automatically render the entity liable for infringement. Under UK and European competition regimes, there are non-exhaustive lists of examples of behaviour which may be regarded as anti-competitive, but these lists are merely for guidance and the particular facts of the case are looked at to determine whether the effect of the behaviour in question restricts or prevents competition before a decision on infringement is made. The Law Society suggests that the proposed competition regime in Hong Kong be in accordance with international practices and that the purpose and/or effect of the behaviour be considered before deciding whether there is an infringement.

Question 7
Should any new competition law allow for exclusions or exemptions from the application of some or all aspects of the law, and if so, in what circumstances should such exemptions apply?

7.1. The competition law should allow for exclusions or exemptions where there is a public policy or economic grounds for not applying the law to certain sectors or in specific cases.

7.2 However, providing for too many exclusions or exemptions would likely dilute the effectiveness of the law. It is suggested that exclusions or exemptions should be justified on the ground of "*public benefit*".

7.3 Apart from providing within the main body of the law for certain sectors to be excluded from the application of some or all aspects of the law, the legislation may also provide a mechanism whereby the regulatory body may grant exemptions on the ground of "*public benefit*". Such exemptions may take the form of subsidiary legislation requiring the vetting of the Legislative Council. Besides, a person may seek exemption from the regulatory body who may consider the application on a case-by-case basis.

7.4 In some cases, Hong Kong statutes, regulations and the common law already recognises situations where public policy or other grounds exist for limiting competition in relation the provision of particular goods or services. Typically these relate to the provision of goods or services where it is deemed to be in the interest of the public to require the providers of such goods and services to be qualified or regulated. The Law Society considers that any new competition law in Hong Kong should not have the effect of overriding Hong Kong statutes, regulations or the common law (whether taking effect before or after the introduction of any new competition law) and the new competition law should explicitly address this point.

Question 8
Which is the most suitable of the three principal options set out below for a regulatory framework for the enforcement of any new competition law for Hong Kong?

8.1 The Law Society considers Option 2 to be the most suitable option for enforcement of any new competition law in Hong Kong: i.e. separation of the roles of adjudication by the regulator and enforcement by the courts. By separating the processes of adjudication and enforcement, the operation of the law will be seen to be fairer and more transparent as the courts will act as a balance to the enforcement agency. This will allow the general public as well as businesses to have greater confidence in any new competition law. To this end, the government must allocate sufficient resources to the Judiciary to enable it to undertake the additional work.

8.2 The regulator, in any event is likely under any proposed system to have the power to make "*cease and desist orders*" in respect of any alleged anti-competitive activity. Many cases on this basis may not in fact proceed to formal adjudication by the courts. The regulator would also have power to enter into binding settlement orders. Such orders should be appealable to the courts.

8.3 The courts have considerable expertise in applying and interpreting the law, but will not initially have much experience of the concepts involved in adjudicating anti-competitive activities and the principles involved in a pro-competition policy. It would therefore be suitable to have the regulator responsible for investigating suspected anti-competitive conduct and for the results on any investigation to be presented to the courts for determining whether the suspected conduct indeed infringes competition law. In such circumstances, the entity suspected of dealing or engaging in anti-competitive conduct is assured that an objective decision is handed down.

8.4 Although the separation of enforcement and adjudication functions under any new competition law will require more resources, the public in Hong Kong is keen on transparency of decision making processes, especially those made by government or quasi-governmental agencies. If the competition regulator deals with both the adjudication and enforcement of competition cases, there may well be objections that this is not sufficiently transparent and judicial review of decisions is likely, quite apart from any allegations of unfair treatment, or procedural irregularity.

8.5 Although not directly relating to competition aspects, the courts have already indicated that in the absence of a statutory restriction they have jurisdiction to examine separately decisions of the regulator, e.g. the Broadcasting Authority as in *Hong Kong Cable*

Television Ltd v TVB and Galaxy Satellite .Broadcasting (Action Nos. 1171 and 1256 of 2005). However, aside from competition cases brought under the Telecommunications Ordinance and the Broadcasting Ordinance, any proposed competition law will be new to Hong Kong and the courts are well adept to consider new concepts judicially. Moreover, by allocating the adjudication of competition law to the courts, it will allow experience and expertise to be built up in handling such cases.

8.6 Taking the example of the Independent Commission Against Corruption (ICAC), the enforcement process (i.e. investigations into suspected corruption cases) is undertaken by the ICAC whereas the adjudication process is overseen by the courts which decide whether the suspected conduct is an infringement of the law. This shows that separating the functions of enforcement and adjudication between different authorities is not an alien concept in Hong Kong and works well in practice.

8.7 Some jurisdictions do adopt a single authority to deal with both enforcement and adjudication (e.g. in EU, UK, Jersey and Singapore) but with rights of appeal to the court. It may be argued that since Hong Kong is a small economy, a single authority will allow consolidation of resources and a more simple and streamlined procedure. However, in light of the existing regulatory regimes in Hong Kong and the strong sense of accountability required by the general public, the option of separating the adjudication and enforcement process seems desirable.

Question 9
Regardless of the option you may prefer, should the regulator be self-standing or should a two-tier structure be adopted, whereby a full-time executive is put under the supervision of a management board made up of individuals appointed from different sectors of the community?

9.1 The Law Society recommends that the regulator should be self-standing as a single structure without the need for supervision by a separate management board. As there is currently no competition law, any competition regulator to be set up in Hong Kong will be starting from scratch. In order to set up the competition regulator, representatives from different sectors of the community will already be gathered including members from the Office of Telecommunications Authority and the Broadcasting Authority with experience in dealing with competition cases. Given the lack of expertise outside these industries, it would also be advisable to look for those with appropriate experience overseas. On this basis, there is no need for a separate management board which will only serve to stretch or duplicate the limited resources available and encourage greater bureaucracy.

9.2 As indicated, on the basis of our proposal to separate the enforcement and adjudication processes, there will be less need for an independent supervisory management board to oversee the activities of the competition regulator. The courts will in effect have the power to oversee these activities in the course of its decision making process.

9.3 Further, as long as the competition regulator comprises of individuals from different sectors of the community and, similar to the Securities and Futures Commission (SFC) and the ICAC, is independent from the government, there does not appear to be any need for an additional management board.

9.4 The establishment of a separate management board will involve more resources. It may also complicate issues as members of the board may, in some way, be connected with companies or individuals involved in suspected anti-competitive behaviour cases, and thus give rise to conflict which would hinder the work of the competition regulator.

9.5 Taking a look at the structure of competition regulators around the world such as in Australia, Singapore and the UK, it is noted that most competition regulators have a self-standing structure without any supervisory management board. It does not appear necessary in these jurisdictions to have a two-tier structure in order to project the image of independence and separation from the government. It thus seems that the establishment of one self-standing competition regulator in Hong Kong will be in line with current international practice.

Questions 10
In order to help minimise trivial, frivolous or malicious complaints, should any new competition law provide that only the regulatory authority has the power to conduct formal investigations into possible anti-competitive conduct?

10.1 We agree that only the regulatory authority (and no other body or private individual) should have the power to conduct formal investigations into alleged abusive behaviour.

10.2 The regulatory authority should be open to considering complaints by others as to the behaviour of a party that is alleged to be abusive.

10.3 The regulatory authority should not, however, be obliged to conduct a full formal investigation into every complaint it receives. There needs to be a process to weed out complaints that the authority believes to be without substance (or, in the words of the consultation paper, complaints that are "*trivial, frivolous or malicious*").

10.4 We consider, therefore, there should be a threshold which needs to be met before the regulatory authority is obliged to investigate a complaint made to it in relation to abusive behaviour. However, the threshold level should not be set too high. In the UK, section 25 of the Competition Act provides that the Office of Fair Trading (OFT) may conduct an investigation if there are: "*reasonable grounds for suspecting*" cartel or abusive behaviour prohibited by the Act which is often referred to as the "*section 25 threshold*". We suggest this will provide a balanced approach, and give the regulatory authority reasonable scope to investigate alleged misconduct, whilst preventing it from being overburdened by an obligation to investigate every complaint.

Question 11
What formal powers of investigation should a regulatory authority have under any new competition law?

11.1 Clearly, once the threshold is reached, and the regulator has commenced a formal investigation into alleged abusive behaviour, the regulator - as any regulator - will require effective investigatory powers to obtain information and to conduct investigations. In order to eradicate abusive behaviour, the regulator needs wide powers to conduct inquiries and investigations.

11.2 These powers should include (i) notices requiring the production of documents or information, (ii) the power to enter premises without a warrant, and (iii) the power to enter premises with a warrant. We deal with each of these briefly below.

11.3 The regulator should be entitled to give notice requiring a person to produce to the regulator a specified document or specified information (by item or by category) which the regulator considers relevant to the investigation. Such a notice should indicate the subject-matter and purpose of the investigation, and the offences involved in non-compliance (see Question 12 below). The regulator should also be able to take copies or extracts from a document produced and to ask for an explanation of it. If a document is not produced, then the regulator should be entitled to ask why, and as to its whereabouts.

11.4 The regulator should be entitled to enter onto any premises in connection with an investigation. Where an officer of the regulator exercises the power to enter onto any premises without first obtaining a warrant from the High Court (the right of "*peaceable entry*"), that officer ought to be obliged to have the prior written authority of the regulator to so enter the premises and he should produce this on entry, together with a document setting out the subject-matter and purpose of the investigation, and (again) the offences involved in non-compliance. Where the premises being entered is that of the entity under investigation, there should be no requirement to give prior warning or notice, nor of (for example) exhausting other available powers to obtain information before resorting to this power. In other cases, prior notice should be given. Whilst on the premises, the officer should be entitled to require any person there to produce any documents which the officer considers relevant, to advise where a document may be found and require an explanation of any document produced. He should also be entitled to take a copy of a document (or an extract of any document), or require the production of a legible copy of any information held on a computer. However, he would not have the power of search, nor of forcible entry, which would only be exercisable where entry was pursuant to a warrant of the High Court (see immediately below).

11.5 The regulator should also be entitled to apply to the High Court for a warrant giving a power of entry to named officers (as well as non-employees such as IT experts who may be able to assist with the investigation). Such a warrant may be issued in certain specified circumstances, and may allow for the use of reasonable force to obtain entry (the right of "*forcible entry*"). The specified circumstances might include:

- there are reasonable grounds for suspecting a document that the regulator could obtain by written notice of peaceable entry is on the premises but would be interfered with if it were required to be produced;

- entry without a warrant for the purpose of the investigation has been impossible and there are reasonable grounds for suspecting documents are on the premises which could have been required if entry had been obtained.

The subject-matter and purpose of the investigation, as well as the offences for non compliance, should be indicated on the warrant. Force may not be used against any person in effecting entry. The officers should have similar powers as when exercising the right of peaceable entry (e.g. to require the production of documents) but also powers to preserve documents/evidence (by, for example taking away originals of documents if necessary to prevent their disappearance).

11.6 There will need to be limits upon the use of the powers of investigation - such as to protect privileged communications, and the privilege against self-incrimination, as well as the protection of confidentiality by restricting the disclosure of information obtained during the course of an investigation. Those matters are dealt with elsewhere herein.

Question 12
Should failure to co-operate with formal investigations by the regulatory authority be made a criminal offence?

12.1 As the Government's public discussion document notes (at paragraphs 114-115 on page 49), authorities in Hong Kong and competition regulators overseas have formal powers of investigation by which they might require persons to produce documents or provide information; a person's failure to cooperate, when these powers of investigation are invoked, being considered a criminal offence. Similarly, and consistent with the approach overseas and with the position of other regulators in Hong Kong, we consider that there should be criminal sanctions for failing to cooperate with formal investigations by the regulatory authority (which is a different question altogether than whether a breach of competition laws per se should be a civil or criminal offence).

12.2 Offences would include failing to comply with any proper requirement of an officer exercising his investigatory powers; obstructing an officer in the performance of his powers; destroying, disposing of, falsifying or concealing documents or causing or permitting these things to occur; and supplying materially false or misleading information.

12.3 Provision would need to be made for defences to those offences - for example, it might be a defence to a charge that a person had not produced a document for him to show that he did not have that document in his possession or control, or that it was not reasonably practicable for him to obtain it.

12.4 The penalties would depend on whether the offence is considered serious enough to be taken on indictment, or whether it can be tried summarily, but either route should be available and the penalties could be substantial in an appropriate case. Usually, penalties would be financial, but in some cases could include imprisonment too.

Question 13
How might a competition regulatory authority deal with the disclosure of information that comes to its knowledge having regard to the need to protect various categories of confidential information on the one hand, and the need to make appropriate disclosure in order to take forward an investigation when the circumstances so require?

The right to require the disclosure of confidential information

13.1 The power to compel individuals or companies to produce information that may otherwise be confidential is one which is commonly given to regulatory authorities or law enforcement agencies. Bodies like the SFC and the TA have the right to issue legally binding information disclosure/ documents production notices. This is an unavoidable result of the need for investigations into alleged criminal or regulatory infractions which almost inevitably involve confidential information.

13.2 On this basis, it would be fair to say that if competition legislation is to have any "*teeth*", then it would be essential for a competition authority to have the power to compel the production of confidential information. Further, the power given should extend to the ability for a competition commission to gain access to documents and information held outside of Hong Kong but to which a person/entity in Hong Kong has rights of access or ownership.

13.3 However, as with the powers of other regulatory bodies and law enforcement agencies there should be an express provision in the legislation shielding from disclosure material that attracts legal professional privilege ("LPP"). LPP is a fundamental right (whether at common law or under Article 35 of the Basic Law) that must not be compromised under any circumstances.

Uses of confidential information obtained

13.4 It is perhaps trite to say that any confidential information obtained by a competition authority can be used for its own investigations and its own regulatory actions. In relation to the latter, it may be noted that the fact that confidential information may be sensitive for a company does not, for example, prevent its use as evidence in criminal proceedings or other forms of regulatory actions. If the information cannot be so relied upon, then the reasons for any decision made or settlement entered into (both of which would be publicly announced) by the competition authority may become incomplete.

13.5 However, there are two areas where the use of confidential information may be less straightforward:

13.5.1 passing on of such information to a complainant in a competition investigation to enable it to respond to any preliminary findings by a competition authority; and

13.5.2 disclosure of information obtained by a competition authority to other regulatory authorities or law enforcement agencies where such information appears to indicate an illegal act that falls within the scope of authority of these bodies.

Disclosure of information to a complainant

13.6 A complainant may often be a competitor to the party that is being investigated. On its face, if a competition authority discloses confidential information from an investigated party to the complainant, it might give the complainant an unfair competitive advantage in its business rivalry with the investigated party. This could undermine the very purpose of competition legislation.

13.7 Nonetheless, there may be situations where it is in the public's interest for a competition authority to disclose the information obtained from an investigated party to the public (including the complainant). Such provisions are currently found in both the Broadcasting and Telecommunications Ordinances.

13.8 In the present context, an investigation may, for example, be launched into parties within a highly specialised industry sector. A competition authority may then receive confidential information from an investigated party which, on its face, does not disclose any anti-competitive conduct.

13.9 However, it may be that the conduct indicated by the information may in fact be anti-competitive in the sector in question. In such cases, it might be in the public interest for the information (possibly with highly sensitive information as specific accounting figures redacted) to be made available for all, including the complainant, so that submissions can be made in relation to the information.

13.10 Whilst a similar argument for access to information by a complainant had failed in relation to similar provisions found in the Broadcasting Ordinance,[7] it was made in the context of an expert, industry-specific regulator. The notion of "*public interest*" for the release of confidential information to a complainant may well be wider when applied to a generalist competition authority.

13.11 Therefore, it is proposed that a competition authority be given the power to disclose confidential information received by it to the public (including a complainant) subject to a public interest test, and the consultation of the party providing the information.

Disclosure of information to other regulatory bodies

13.12 The other main possible use for confidential information collected by a competition authority is whether it can be passed on for use by other regulatory bodies. Authorities such as the SFC and the Hong Kong Monetary Authority ("HKMA"), for example, do have certain rights to pass information collected to another regulatory agency without first notifying the person supplying the information.

13.13 On the other hand, in their administration of industry-specific competition regimes, the Broadcasting and Telecommunications Authorities do not appear to have such rights (save for passing information to each other).

13.14 The issue, therefore, is which of the two models for handling confidential information as regards other regulatory authorities should be adopted in the proposed competition legislation.

13.15 In this regard, we note that it is not currently proposed that competition law infringements should be made criminal offences over which a competition authority would have the power to investigate. This is unlike the SFC and the HKMA, which have regulatory jurisdiction over the investigation of certain criminal acts. Thus, we believe that there is no proper basis for giving a competition authority the power to pass on information to other bodies which may use it for the purposes of a criminal prosecution.

However, should the Government be of a different view and decide to give a competition authority the power to pass on such information, we believe that the information should be subject to the privilege against self-incrimination. This will ensure that the rights of the party giving the information are at least given some degree of protection (namely that the information can only be used by another body for intelligence-gathering purposes and not as evidence against a party).

[7] *PCCW Limited v Broadcasting Authority* (HCAL 97/2005, 26 January 2006, Reyes J).

Question 14
Should the existing sector specific regulators that also have a competition role continue to play such a role if a cross-sector competition regulatory authority were to be established?

14.1 The Law Society is of the view that there should be a single regulator with authority to regulate anti-competitive conduct in all sectors of Hong Kong's economy. If there were multiple regulators this would have the potential to create an unnecessary level of bureaucracy as well as create confusion as to which regulator(s) has (have) jurisdiction in particular cases.

14.2 However, the Law Society notes that the existing regulators of the telecommunications and broadcasting spectrum in Hong Kong have similar counterparts in overseas regimes, where there is also competition regulation in force.

14.3 The more stringent regime for these two particular sectors may be due to the fact that in Hong Kong and most other jurisdictions, licences are required in order to operate. Broadcasting, in particular, is in the public domain and therefore needs to be regulated carefully. Competition in the UK is governed by the Competition Act 1998 and Articles 81 and 82 of the EC Treaty. However, the independent regulatory body, Ofcom has wide-ranging duties covering various industries, for example, television, radio and wireless communication. Ofcom also has statutory duties under the Communications Act 2003 to further the interests of citizens and consumers by promoting competition and protecting consumers from harmful or offensive material.

14.4 Similarly, the US is governed by the Sherman Antitrust Act 1890 and Clayton Antitrust Act, 1914. The Federal Communications Commission (FCC), established by the Communications Act 1934 also acts as an independent agency charged with regulating interstate and international communications by radio, television, wire, satellite and cable.

14.5 For the reasons that this sector is monitored more carefully overseas, it would seem practical that the broadcasting sector in particular is individually monitored in Hong Kong, but such monitoring by sector specific regulatory authorities should not exclude the jurisdiction of a general competition regulatory authority.

14.6 Even if separate competition regulations are to be maintained for different sectors, they should have the same basic competition rules in order to ensure consistency.

Question 15
Should breaches of any new competition law be considered civil or criminal infringements? What levels of penalty would be suitable?

15.1 If any competition law is to have effectiveness, the courts must be able to levy penalties for engaging in anti-competitive conduct that have a sufficiently high deterrent effect. As noted in the consultation paper, such action on the part of the courts can take the form of civil or criminal sanctions.

15.2 Given that any law that extends to cross-sector interests to deter anti-competitive would be relatively new to Hong Kong, the Law Society submits that criminal sanctions should be limited. Because perpetrators of anti-competitive conduct may do so without knowing the full implications of the acts, it is submitted that only those who continue to engage in anti-competitive conduct after a cease-and-desist order has been served should be held criminally

accountable. Others who could be criminally sanctioned should be limited to those who repeatedly and deliberately frustrate an investigation.

15.3 If criminal sanctions are imposed, anti-competitive conduct could result in a fine or even imprisonment. However since criminal liability will require the prosecution to prove *mens rea*, there must be evidence to support this, and thus the purpose of any conduct resulting in alleged anti-competitive acts. In any event, the Law Society submits that it would be sufficient to impose fines and other non custodial sentences such as removing the ability of any individuals concerned to be a director of the company engaging in anti-competitive conduct. Imprisonment is perhaps too heavy a penalty.

15.4 The regulator could also be conferred with the right to seek remedies through civil proceedings, akin to the powers of the Securities and Futures Commission. The onus of proof in such cases would be less demanding. Nonetheless the remedies could be effective if the range of options includes for example the ability to disgorge profits assessed to have been gained through anti-competitive conduct.

Question 16
Should any new competition law include a leniency programme?

16.1 Cartels usually operate secretively and developing information as to their activities could pose a challenge to the regulatory authority. If there is an incentive then a member of a cartel would more likely be willing to come forward with essential information to enable an investigation or even a prosecution. A suitable incentive would be a leniency programme whereby the cartel member that provides relevant information, while nonetheless guilty of anti-competitive conduct, would have a fine reduced or even waived.

16.2 The courts should have regard to various factors such as the usefulness of the information provided, the timeliness of the provision of information, the cooperation rendered to regulators in the course of the investigation and whether, and if so how, this company had encouraged others to participate in a cartel.

16.3 There must also be consideration of the timing of any anti-competitive conduct. If and when new legislation is introduced, individuals and businesses must be given a reasonable period of time to remove offending elements of what constitutes anti-competitive conduct. A process of education must precede any robust enforcement of new laws, particularly as livelihood issues are involved and criminal sanctions may be levied.

Question 17
Should any new competition regulator be empowered to issue orders to "cease and decease" from anti-competitive conduct?

17.1 The answer to this question must be yes. The new competition regulator should have the power to make the order itself rather than to go to court to get the order so as to avoid delay. There should however be sufficient safeguard in place to ensure that interested parties have the right to review/appeal against that order.

Question 18:
As an alternative to formal proceedings, might any new competition regulator has the authority to reach a binding settlement with parties suspected of anti-competitive conduct?

18.1 The new competition regulator should only have the power to settle with a party guilty of anti-competitive conduct on condition that such party accepts its conduct amounted to anti-competitive conduct. Hence any affected parties could still take legal action on that unlawful conduct. The conduct complained of should either be anti-competitive conduct or it is not. The power to settle should only be given on the basis that the party accepts their conduct is anti-competitive conduct. This could save investigation and judicial time for the adjudication itself without compromising any rights that a 3rd party might have on the anti-competitive conduct. Any decision made by the new competition regulator to settle with a party must be published.

Question 19
Should any new competition law allow parties to make civil claims for damages arising from anti-competitive conduct by another party?

19.1 The answer should be yes. Given that any anti-competitive conduct is unlawful conduct the finding of or the acceptance by the Respondent of that conduct as an unlawful conduct should enable other parties to institute legal proceedings for damages based on such unlawful conduct. We agree with the observation set out in paragraph 131 pf the Consultation Paper that some kind of time limit should be introduced to ensure that legal action could only be taken within a certain time frame.

Question 20
How should any new competition law address the concerns that our businesses, especially our SMEs, may face an onerous legal burden as a result of such civil claims?

20.1 To address the concerns of certain businesses, particularly the SMEs, the law may provide that private action could only be pursued after the regulatory body has made a decision that the conduct in question constitutes an infringement of the competition law. A time limit for taking private action should also be imposed. The regulatory body should not be entitled to award costs to a party, but when a civil action is involved, the Court would make orders as to legal costs pursuant to the normal procedures.

Taking into account these points, the detail of any proposed competition law should be carefully examined. The Law Society's general support at this stage is not to be taken as a blanket acceptance of any specific provisions that may be introduced. Moreover, the effect of the law if passed and the associated regulatory processes should be kept under review both to determine its effectiveness and any possible abuse.

The Law Society of Hong Kong
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